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### DOES ARBITRATION OUST THE COURTS OF JURISDICTION?

The courts of this country will either have to confess error and retrace their steps or the legislatures must come to the relief of the business men who compose the various chambers of commerce in this country who are demanding that the law recognize the validity and irrevocability of arbitration agreements.

All the world recognizes such agreements but the United States, and here alone judicial jealousy has operated not only to prevent business men from establishing more expeditious means for determining business controversies, but has burdened the courts with much litigation which could have been transferred to arbitration tribunals like those in London and other great commercial centers. In this country alone, our judges, following a rule of the English common law which the English judges discarded over fifty years ago, refuse to enforce an agreement to arbitrate, although they will enforce an award of arbitrators. This anomalous position is explained in some degree by the history of arbitration agreements.

Arbitration, in spite of the fact that it has sometimes been frowned upon by the courts, is not of statutory origin, but is one of the ancient practices of the common law, as well as of the civil law. The statute of William III and other statutes like it in England and America, did not originate the practice of arbitration, but simply provided a method of transforming the award of the arbitrators into a judgment. At the common law, an award has no more binding effect on the parties than the original obligation created by the contract of the parties. As said by Russel, J., in *Evans v. Edenfield*, 7 Ga. App. 175, 66 S. E. Rep.

491, "the difference between a statutory award and a common-law award is that the latter affords only a basis of an action; it is binding on the person submitting, but it can only be made the foundation of an action, and is not entitled to be made the judgment of the court."

Judges of narrow vision have always shown an unmistakable jealousy toward arbitration. Lord Mansfield, who did more for the extension of the law to meet the needs of commerce, is justly entitled to credit for doing much in his day to prove to the courts that arbitration was not a practice intended to reflect adversely upon the courts, but a practice justified by the needs of business. In *Simmonds v. Swaine*, 1 Taunt. 549, Mansfield declared that "the courts have sometimes been very strongly inclined against awards, as carrying away causes from their own jurisdiction to the decision of private persons, but they now give these instruments a more liberal construction."

In *Fluharty v. Beatty*, 22 W. Va. 698, the Court said that in the early history of English jurisprudence, "the established tribunals manifested jealousy of so irregular a substitute as was presented by a board of arbitration liable often to be composed either in whole or in part of laymen."

The "more liberal attitude" which Mansfield declared the judges were taking toward arbitration in his day was probably a result of Mansfield's own commanding legal personality which shamed all the objectors to silence. The prejudice exists today, at least in America, and shows itself in the stubborn resistance of the Courts to any extension of the principles of arbitration and especially to every effort to secure for the agreement to arbitrate the attribute of irrevocability.

Why were agreements to arbitrate held to be revocable? Our courts declare that to hold them to be irrevocable would oust the courts of jurisdiction. The early common law cases simply declared that they were revocable on the technical ground that they cre-

ated agencies or powers not coupled with an interest (clearly erroneous) and therefore revocable by the authority which created the power at any time before the power was executed. Our American courts have followed the older English cases with sheep-like blindness, utterly ignoring the later English cases which have overturned the rule at common law. The only contributions our courts have made to the subject consist of the different reasons assigned for the rule itself. Our courts have rationalized a patent judicial error until the rule itself appears plausible to the superficial student of the law.

It is interesting to note that many English judges were never in sympathy with the common law rule and expressed their regret on not a few occasions. In *Northampton Gaslight Co. v. Parnell*, 15 C. B. 630, 80 E. C. L. 630, 139 Reprint, 572, Maule, J., said: "The old rule upon which it was held that the power of an arbitrator was revocable, was that a power not coupled with an interest was revocable,—revocable by the authority which created it. From that rule it was inferred—erroneously, as I think—that one of the parties to a submission might revoke without the other. It seems to me that that was allowing one man to affect the interest of another. But it was an inveterate error."

The American courts have, in most cases, abandoned the technical ground on which the rule first rested and have substituted the foundation of public policy which sounds better and, like all other rules resting on public policy, affords a more impregnable front to all assaults. In *Parsons v. Ambos*, 121 Ga. 98, the Court dismisses all other reasons except the one that "unless an agreement to arbitrate is held to be, by its nature, revocable before the award is made, nothing would be easier than for the more astute party to oust the courts of jurisdiction." The Court then concludes: "But whether predicated on the idea that the agreement is repugnant to the contract or to public policy, the principle is universally

recognized that such general submissions are revocable."

When the Georgia Court made the declaration of the "universality" of the rule it was discussing, the English courts had already repudiated it and there was no civilized commercial nation in the world that held to such a rule. What can the word, "universal" mean in such a connection? In *Dickson Mfg. Co. v. American Locomotive Co.*, 119 Fed. 488, in which the defendant's contention that the plaintiff's express agreement to be bound only by the finding of an arbitration tribunal, operated to prevent his resort to the courts, was denied, the Court said that "in such a case as this even an express covenant not to revoke would not prevent a revocation, and further, the Court said: "It is not in the power of parties to a contract to oust the courts of their jurisdiction."

The decision which started all the trouble was by Lord Coke in *Vynior's Case*, 4 Coke 302. This was a suit on a bond given to enforce a submission to arbitration. Defendant revoked the power of the arbitrator, refusing a submission. *Vynior*, the other party to the agreement, then brought suit on the bond and recovered. The theory of the recovery was that defendant had breached one of the conditions of the bond "to submit his case to arbitration." The case really should have turned on this point alone, namely, the violation of an express provision in the bond; but the Court makes a further statement upon which the early English cases relied, but which our American judges seldom repeat, namely: "A man cannot by his act make such authority, power or covenant not countermandable, which is by the law and of its own nature countermandable." The reason that modern courts do not mention this reason is that it is hardly tenable today in view of the growth of the law in regard to the obligation of parol contracts. Such contracts, in most cases, were not enforceable at common law, if "God's penny" had not passed. Of course, if the agreement to submit a case

to arbitration creates no obligation on either party to submit to arbitration, then, like any other unilateral promise, it is not obligatory until acted upon and may be revoked at any time prior thereto. But if it is an enforceable promise, the obligation should be recognized by the law.

The first case to assert the reason that an agreement to arbitrate ousted the courts of jurisdiction was *Kill v. Hollister* (18 Geo. II 1746), 1 Wils. 129. This declaration was made in a case where the defendant had not insisted on a submission and the simple question was whether a clause in the contract agreeing to arbitrate necessarily prevented the Court from taking jurisdiction of a suit upon such contract. The Court said it did not, but were careful to say that if a reference were pending, the result would have been different. It is interesting to note that in that case, Sir John Scott, afterwards Lord Eldon, declared in argument that "the jurisdiction of the Court is not ousted by an agreement to arbitrate more than by a release of all right of action."

The rule thus established in *Vynior's Case* and in *Kill v. Hollister* was brought over to America and there it has become so rigid as to obstruct all attempts to enlarge the field of commercial arbitration. In England, fortunately, there were judges like Lord Campbell and Lord Cranworth who saw the error and the danger in such a rule. Those judges, after a quarter of a century of argument and vacillation on the part of the courts of England, succeeded in overcoming the rule and establishing arbitration agreements on a par with other agreements and relieved the English courts of the charge that they were willing to allow their jealousy to stand in the way of the necessities of English commerce. The first breach in the old rule was made by Lord Campbell in the case of *Scott v. Avery*, 5 H. L. C. 811. In this case, Lord Campbell refused to take jurisdiction of a controversy over an insurance contract which the parties had agreed should be submitted to arbitration. Lord Campbell said the parties had a right

to make such a contract and said he could find no vital rule of public policy which interfered with the enforcement of the agreement to arbitrate. "On the contrary," he said, "public policy seems to require that effect should be given to the contract of the parties. For," he argued with irresistible logic, "what pretense can there be for saying that there is anything contrary to public policy in allowing parties to contract, that they shall not be liable to any action until their liability has been ascertained by a domestic and private tribunal, upon which they themselves agree?"

Lord Campbell's opinion changed the law of England. Some of the judges, it is true, hesitated to go so boldly in the very face of the rule of *stare decisis*, but in less than a generation the validity and irrevocability of arbitration agreements were fully established in England and a new jurisprudence built up regulating the enforcement of awards made by private arbitration tribunals that have since been created in every great board of trade in England, to which it is now customary in England to refer all disputes arising in business transactions. *Viney v. Bignold L. R.*, 20 Q. B. D. 172.

American business men are properly demanding the same facilities for determining business disputes which other business men in other parts of the world are enjoying, and it remains to be seen whether our courts will be as liberal and as generous as the English courts have been in conceding the point involved. A straw which shows how the wind is blowing is the decision of the New York Court of Appeals in the case of *Berkovitz v. Arbib*, 130 N. E. Rep. 288, 93 Cent. L. J. 263. In sustaining the validity of the Arbitration Act of New York, the Court declared that the idea that such agreements oust the Courts of jurisdiction is not tenable. On the contrary, the Court declared that "jurisdiction is not renounced, but the time and manner of its exercise are adapted to the convention of the parties restricting the media of proof." The Court declared that this rule always

had "a feeble hold upon the common law" and that at any rate, that Court would "not go so far" as to hold that it had become "imbedded in the foundations of our jurisprudence" so that "nothing less than an amendment to the Constitution could change it."

### NOTES OF IMPORTANT DECISIONS

**TO WHOM DOES A PATENT RIGHT BELONG AS BETWEEN EMPLOYER AND EMPLOYEE.**—In view of the fact that it is very difficult to draw the line between employer and employee as to their respective rights in the inventions of the employee, discovered in the course of his employment, it would be wise for both to enter into a contract specifically determining the extent of their mutual rights and obligations with respect to the inventions of the employee.

In the recent case of *Wireless Specialty Apparatus v. Mica Condenser Co.*, 131 N. E. Rep. 307 (Mass.) it was the employee who suffered and lost the benefit of his invention. In most cases however, it is the employer who suffers.

In the great majority of cases an invention made by an employee, in the course of his employment and at his employer's expense is the property of the inventor unless he has by the terms of his employment, or otherwise, agreed to transfer to his employer its ownership as distinguished from its use. It matters not how valuable the invention or how vital its control may be for the success of the business in which it has been conceived (*Am. Circular Loom Co. v. Wilson*, 198 Mass., 182, 84 N. E., 133, 126 Am. St. Rep., 409; *Am. Stay Co. v. Delaney*, 211 Mass., 229, 97 N. E., 911, Ann. Cas., 1913B, 509; *Haggood v. Hewitt*, 119 U. S. 226, 7 Sup. Ct., 193, 30 L. Ed., 369; *Dalzell v. Dueben Mfg. Co.*, 149 U. S., 315, 13 Sup. Ct., 886, 37 L. Ed., 749; *Pressed Steel Car Co. v. Hansen*, 137 Fed., 403, 71 C. C. A., 207, 2 L. R. A., N. S. 1172; *Dempsey v. Dobson*, 174 Pa., 122, 34 Atl., 459, 32 L. R. A., 761, 52 Am. St. Rep., 816.)

In the Condenser case just referred to the plaintiff decided to turn its operations from war work to the industrial field. It therefore directed one of its employees, who was a party

defendant, to make experiments with its radio condensers for the purpose of devising a method of making such condensers available for other electrical apparatus. His employee discovered a condenser which would serve the purpose sought by his employer, but applied for the patent in his own name. He then entered the employ of defendant and assigned to his new employer his rights in the patent for which he had made application. Plaintiff, in his present suit prays that the defendants be compelled to assign the patent to plaintiff, on the ground that it was a secret process belonging to the plaintiff. In sustaining a judgment for the plaintiff the Supreme Court of Massachusetts said:

"There is no doubt whatever of the proposition that the mere fact that a person is in the employ of the government does not preclude him from making improvements in the machines with which he is connected and obtaining patents therefor as his individual property, and that in such case the government would have no more right to seize upon and appropriate such property than any other proprietor would have. On the other hand, it is equally clear that if the patentee be employed to invent or devise such improvements his patents obtained therefor belong to his employer, since in making such improvements he is merely doing what he was hired to do. See also *Mc Aleer v. United States* (150 U. S., 424, 430, 14 Sup. Ct., 160, 37 L. Ed., 1130), *Dowse v. Federal Rubber Co.* (254 Fed. 303) *Ingle v. Landis Tool Co.*, (D. C., 262 Fed., 150), *Pomeroy Ink Co. v. Pomeroy* (77 N. J. Eq., 293, 297, 78 Atl., 698), *Portland Iron Works v. Willett* (49 Or., 245, 89 Pac., 421, 90 Pac., 1000)."

Many of the older cases do not go as far as the Condenser case; most of the judges being content to limit the rule that an invention belongs to the employee who invents it only where the employer, by the express terms of the hiring, demands the fruit of the employee's inventive labor. The United States Supreme Court, in the case of *Solomon v. United States* 137 U. S. 342, adopted the breach of trust theory and held that where the employee is specially employed for the purpose of making improvements, it would constitute a breach of trust and confidence on the part of the employee for him to use the information thus gained at his master's expense for himself in all cases where the new method discovered is one which the master employed the defendant to seek for. The Court held that the want of an express contract, necessary under the old rule, was not required under such circumstances.

## THE FUNCTION AND SCOPE OF A COURSE IN LEGAL LIABILITY.

In 1914 Prof. Beale of the Harvard Law School published his case-book on Legal Liability. This was the first time, so far as the writer is aware, that legal liability was looked upon and taught as a subject apart from its ordinary context in the law of torts and the law of crimes. In the past seven years several schools in the Association of American Law Schools have added the course to their curriculum. At the last meeting of the Association of American Law Schools, it became apparent that those who are teaching, or have taught the course, are at odds as to the value and function of the course. Prof. Beale himself has not, to the knowledge of the writer, expressed his ideas as to the value of the course as a separate subject matter, but in the preface to the first edition of his case-book (which preface remains unchanged in the second edition just published), he indicates the object of the course when he says:

"The subject of the present collection is that body of legal principles which determines whether one may be charged with the consequences of his act. Not all the requisites of ultimate liability are here considered; the element of blame is not treated. It is left for a more particular study of the law of Torts to determine what degree of intention, malice or negligence must exist before one may be forced to make compensation for a wrong; and for the study of Criminal Law to determine how far a guilty mind is requisite before punishment can be inflicted. The topics here considered are those fundamental ones which are a common element of torts and crimes; and the object of the collection is to prevent that duplication of effort which has hitherto existed through the attempt to include instruction in these topics in courses on Torts and Crimes."<sup>1</sup>

That is, taking into consideration the exigencies of an already overcrowded law school curriculum, whatever would prevent

duplication of effort on the part of the student and the teacher is a good thing, and the function of this course is to prevent, to some extent, that duplication of effort in the sphere of Torts and Crimes. But, I venture to believe, with all due deference to Prof. Beale, that if the prevention of such duplication of effort is all that Prof. Beale sees in this course that he has carved out of two others, he has builded better than he knew. His highly developed and keenly functioning teaching instinct has delimited a subject matter which lends itself marvelously well to a teaching dialectic, the function of which is to shake loose the mind of the beginning student of law from the mess of lazy, hazy, slipshod and inchoate mental processes which he has acquired in his pre-legal stage of education, and to develop, so far as it is humanly possible so to do, an ability to think clearly, to reason accurately, to use language intelligently, and to remember that words and phrases are meaningless unless their content can be made explicit and they are applied in their proper spheres with discrimination. It is, therefore, my purpose, in this article, to indicate what the function and the scope of a course in legal liability are, to my mind. I purpose to approach this problem from the standpoint of pedagogy and not from the angle of substantive law, for I think that this course is primarily one for the stimulation and development of mental processes, and, secondarily, for the imparting of a legal subject matter, although that subject matter which is treated and used as a content in the course, has also an intrinsic value of its own. In so approaching the problem three things will be considered, the function of a law school, the first year curriculum, and the mental fibre of the beginning student of law.

The function of a law school is to teach its students the technique, the purpose and the subject matter of that method of social control which we call the legal ordering

(1) J. H. Beale: *Cases on Legal Liability*, 2<sup>d</sup> Ed. 1920.

of society.<sup>2</sup> This of course, marks off very distinctly the true law school from the school where legal subject matter is taught to those who wish to practice law as a trade rather than as a profession. It differentiates the truly professional school from, to use Prof. Beale's felicitous phrase, "a trade school for legal artisans." If one looks upon the practice of law as a trade like carpentering or upholstering, there is of course a field for the trade law school, but if the law is really a profession and if those who study for this profession are to pursue their tasks in the same spirit as those who enter upon the study of theology or medicine,<sup>3</sup> then we have no concern whatever with the legal trade school. The theory which animates the schools which are members of the Association of American Law Schools is that students who study at these schools are preparing for the practicing of a profession and not for the carrying on of a trade.

Classified on the basis of entrance requirements, the Association Law Schools are of three kinds; those which are graduate schools, those which require some years of college work, and those which demand only a High School education. But if we classify the law schools upon the basis of what the student wants to do while in

the law school, the Association Law Schools are of two kinds, the college of law, and the true law school. The college of law is the institution to which the student comes in lieu of going to college, and he is interested while at the institution not only in the study of the law but in usual college activities, such as glee clubs, debating, Junior Prom, fraternities, sororities, varsity basketball, football, baseball, and track teams. The student is really going to college but is taking Law instead of Arts or Science as the pathway toward his degree. The true law school is the institution to which come students who have had two or more years of college life so that the distractions of undergraduate extracurricular activities pass them by untouched or only slightly moved. These students come to the law school to prepare for the serious business of earning their living by, and making their contribution to society through, the practice of the law. The acquisition of a legal training is of primary importance to them. They allow little or nothing to turn them aside from the pursuit of the law.<sup>4</sup>

The mental fibre of first year students in both types of institutions is practically the same. The severest indictment that can be made of our high school and college educational systems is that they do not turn out a product which, with rare excep-

(3) William H. Taft, *Ibid.*

(2) "The primary object of the law school is to train men to be successful and effective lawyers; not moneymakers or skillful practitioners merely, though each of these is good when achieved honorably, but profound lawyers who will do honor to their profession and subserve the public good." J. C. Towne; *The Organization and Operation of a Law School, Handbook, and Proceedings, Association of American Law Schools, 1910. The Handbook and Proceedings will hereafter be cited as "Proceedings."* "To teach law as a science rather than as an instrumentality of a money-making trade; to teach it from the theoretical side by teachers experienced in practice; to encourage legal research and the production of legal literature; and finally to stimulate in the student knowledge of, and respect for, the professional obligations of the lawyer, are at once the high privilege and duty of the law schools of this country." Harlan F. Stone; *The Function of the American Univ. Law School; Proceedings, 1911. Cf. Also William H. Taft. The Social Importance of Proper Standards for Admission to the Bar. Proceedings, 1913.*

(4) The line of distinction which I have attempted to draw is, of course, not an absolute one. In colleges of law there are men of maturity to whom "college life" means nothing, and who devote themselves whole-heartedly to the study of the law; and in law schools there are students who still have the instincts of college freshmen. This individual personal equation is recognized, but after all, and in the main, the students are of the two types indicated. Whether in either type of school the student is made into a legal mechanic or a professional practitioner depends entirely on the faculty. As are the instructors, so become the students. Cf. David Starr Jordan; *The University, the College and the School of Law, Proceedings, 1908*; John C. Towne; *Organization and Operation of a Law School, Proceedings, 1910*; W. R. Vance, *The Ultimate Function of the Teacher of Law, Proceedings, 1911*; H. S. Richards; *Progress in Legal Education, Proceedings, 1915.*

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tions, possesses a fund of solid, substantial information, or an ability to go to the sources where this information can be obtained. Neither do they turn out a type of mind which knows how to think clearly, reason accurately, or approach a problem with any degree of recognition of the value of a scientific or a purely human approach. The result is that the average law school or college of law has in its first year class a large number of students, each of which is a raw, untrained and unintellectual person who does not know how to look at a thing which is placed before him and who has not learned to find the things which are not directly in his path. He is unable to reason, even half-way logically, either from a given set of facts to a conclusion, or from a given theory to a wider or narrower hypothesis. He has not the ability to be inductive or deductive in his mental processes. He cannot, will not, has not the desire to set himself genuinely to intellectual functioning. He has to be spoon-fed, and sometimes he is too lazy even to gulp. This may seem a harsh indictment but the experience of teachers in the past twenty years bears it out.<sup>5</sup>

If the above analysis is correct, it is obvious that there must be in the first year curriculum a disciplinary course which will attempt to bridge the gulf existing between the lazy, undisciplined mental workings of the beginning student of law and the close-knit, reasoning processes which the student must adopt if he would become a genuine student of legal subjects. This attempt must be made consciously, persistently, in-

tensively. The subject matter which is to act as the vehicle for conveying the mental discipline should consist of some fundamental will constantly meet in all of his legal studies.

The course, which to my mind does actually lend itself in a most admirable fashion to the mental disciplining of the student while he is acquiring the fundamentals which he must know is the course in legal liability. It is a substratum, cross-section course. It contains that to which sound reasoning in any section of substantive law leads ultimately; for it deals with the nature and meaning of acts, omissions, causes and causation, duty, authority, and privilege. Furthermore, it deals with the simple, basic facts of philosophy, sociology, economics, politics, science, religion, morals, medicine, and business, upon which the common law is built, and it compels the student to work through the facts given him to these basic considerations.

This does not mean that the course in legal liability is a course in elementary jurisprudence. It isn't. Nothing, to my mind, could be more harmful than the giving to first year students at the opening of their legal education of some half-baked ideas as to what the instructor thinks the proper juridical concepts are. That would be but adding muck to a mess. The student already has more dogmatic concepts and ideas than are good for him. The course in legal liability is intended to make his mind more flexible and less dogmatic than it was. Its function is squarely that of making the students attempt to think. It employs as its vehicle, definite, though few and simple, concepts, ideas and principles, as they are found in the decided cases and as they are used, in normal fashion, by the Bench and Bar. It is not interested in determining the ultimate truth or falsity of the subject matter, but in determining the meaning and function of this subject matter.

Some who have taught this course have found it wanting. They say that it has no value at all, or that if it has any value, it

(5) H. S. Richards, *Progress in Legal Education*, Proceedings, 1915; "One of the most perplexing problems for every law school is how to deal with that class of students who have apparently not acquired mental discipline in their pre-legal training. Of course, if the man is simply stupid, the sooner he is disposed of, the better; but many men in this class have fair natural capacity, but having been accustomed to the leading methods of secondary schools, and after having acquired a degree by the careful selection of snap courses in college, they enter the law school intellectually flabby, unaccustomed to sustained mental effort, quickly tired, easily satisfied, and lacking intellectual curiosity."

should be taught as a second year subject. But, it is submitted, and with no intention of being unseemly, that the fault lies with the instructor and not with the course. For no one should teach his course who has not had a thorough training, in addition to his law, in logic, philosophy, social psychology, the principles of teaching by dialectic, and one of the sciences like mathematics, chemistry or medicine. The purely analytical lawyer is unable to teach this course; the teacher who is a follower of the historical school of jurisprudence can come closer to conducting the course properly; but only a student of sociological jurisprudence can see and manipulate all the problems presented by the course, and teach it as it should be taught if it is to fulfill its function.<sup>6</sup>

The scope of the course in legal liability is determined in part by its function and in part by the subject matter which is to be utilized for the fulfillment of this function.

In his case-book Prof. Beale has a chapter which he calls "Law." Here he presents extracts from cases and commentaries which aim to indicate the nature and meaning of Law, the origin of the Common Law in America; the meaning and extent of sovereignty, and the jurisdiction of courts and legislatures. It is significant, however, that in his own teaching he does not deal with this chapter. Whether this is due to the fact that he does not think that a course on jurisprudence should be taught to first year men; or that the time at his disposal will not allow the study of this chapter; or whether the subject matter can better be treated in other courses, I do not know. In my own, limited, experience I have found that the first chapter is of no value from a pedagogical standpoint because the subject matter is in its nature too abstract and general. It belongs to a course on the Conflict of Laws, and there indeed Prof. Beale treats it with consummate skill.

So, too, I think that the chapter on the Measure of Compensation,<sup>8</sup> is not pedagog-

ically a part of the course. It is really an attempt to present a denatured course on Damages and has no place in a first year curriculum.

The subject matter of the course properly begins with chapter two. Here we deal with the nature of an act and an omission; determine what is meant by a cause and causation; and see how far along the chain of causes which connects every event with every other event in the universe we need to go, either backward or forward, before we can stop and determine whether liability shall be imposed for the forbidden act of omission. Here, of course, we are dealing with the most fundamental of all things in the law. For, ultimately, all legal problems, it is submitted, are based upon the fact that some one does, or wishes to do, or fails to do, that which under the circumstances of time, place and purpose is forbidden. Without an act or an omission which is forbidden there is no starting point for the imposition of any kind of legal liability. To determine, therefore, what an act is, and how to differentiate it from an omission, is of great importance. It makes a difference in the method of approach to the substantive law of torts, crimes, contracts, agency and conflict of laws, whether we consider an act as an internal volition which happens to have an external manifestation, or whether we will simply look at the objective world and, noting that a change has or has not taken place, say that the change or the absence of it is the act or the omission. The first calls for the consideration of speculations in psychology while the second calls merely for a simple inspection of objective phenomena. And, the reader will please note, that the interest of the course is not in making the student a follower of Arndt, of Windscheid, or James, or Dewey,<sup>9</sup> but in making the student see that there are divergent viewpoints, and what these are, and how the acceptance of one or the other would affect his reasoning and his conclu-

(6) Cf. Papers and Discussion Concerning the Redlich Report, Proceedings, 1915.

(7) Chapter 1.

(8) Chapter 6.

(9) Cf. Pound; Readings in the Roman Law, page 22; James; Psychology Chapter on the Will; Dewey, How We Think.

sions. It is not *what* the student believes but *why* he believes it and *how* he applies his belief that is of primary importance.

Omissions are constantly called causes in the same way that acts are. Yet if by cause is meant that which produces a change, or starts a force, or creates something which was non-existent before, or determines actively the direction and scope of a force or situation, then an omission cannot possibly be a cause. For a *failure* to do never *starts* a force; it never changes anything actively; because nothing is *done*. Where there has been no activity, no releasing of forces, no changing of situations, then the only thing we can see or talk about is the continuance of an activity or force or pre-existing situation and the failure to change this. By an act something is started; by an omission something is not stopped. This is quite obvious, yet it is difficult to get the student to see that the failure to do, nonfeasance, is never the same thing as the doing, feasance or misfeasance, although compensation for injury may be exacted from one who has acted or failed to act.

The discussion of the nature of a cause is of great importance. In the law of torts, crimes, damages and agency one is constantly meeting with instructions to juries which have to do with the maxim "*causa maxima non remota spectatur*," with definitions of proximate and remote causes, with distinctions between direct and consequential damage, and with the application of the rule that a proximate cause is that which leads to natural and probable consequences. This terminology must be grappled with and understood at the very outset of the student's legal career, or it must be constantly reiterated in every course where such language is used. There is, of course, merit in the repetition of ideas when these ideas naturally crop up during discussion in particular classes. But this repetition value is counter-balanced by the amount of time the development of the idea by the dialectic method consumes, and it is submitted that such general terminology

should be threshed out at the beginning of the first year, so that no matter how much the various instructors in the school should differ as to the minutiae of interpretation of the terms, or even as to fundamental concepts, the student has already in his first half-year acquired a basis for fruitful discussion.

This of course presupposes that the teacher of legal liability is not trying to establish a terminology which is *his* terminology. That would be futile and foolish. The instructor is interested, not in making the student acquire a term or definition but in making the student's mind function by drawing distinctions between the various definitions of a word or fact. Definitions are of importance as points of departure and not as resting places. If the definition which the student finally acquires grows out of a consideration of many and diverse variations of this definition, it will be to him not a yardstick to be used in an arbitrary fashion for measurement purposes, but a standard for the guidance of his judgment in new situations. "The mark of his (the student's) lawyerlike quality will be his ability to discern the legal significance and legal possibilities of a new set of facts."<sup>10</sup> The function of a legal definition is to aid the student in applying his knowledge to a new set of facts.

No fact, proposition, situation or life exists by itself. Things are connected and inter-related. As Bishop Butler long ago said; "When I thump the table, I jar the stars." But for practical purposes the lawyer is concerned only with the facts immediately surrounding the activities of his client and those whom his client is suing or defending against. Somewhere within the universal chain of cause and consequence there must be a practical starting and stopping place so far as the specific case before the lawyer is concerned. To find this place is the function of the principle of proximate causation. In discussing this principle

(10) E. R. Thayer, Law Schools and Bar Examinations, Proceedings, 1913.

the student is given an indication of the limits of his field of inquiry. He is made to see that though the chain of cause and consequence stretches back to the beginning of time and forward into eternity, *he* is only concerned with the particular act of the person upon whom he is trying to fasten a liability and the specific consequence which is the injury done to his client. He is also made to realize that there are well-defined principles of law that govern the stopping and starting place of his inquiry, whatever that inquiry may be.

This is of vital importance. It involves teaching the student how to limit the sphere and scope of his inquiry. Even if the student has had that kind of training in his High School and College days, (which is hardly probable) still there is a necessary and inevitable place within the law school curriculum for a course which re-directs the student's abilities when dealing with that which is new to him, namely legal subject matter. The ability to handle electrical apparatus, economic formulae, and the binominal theorem needs to be re-shaped somewhat before the student can handle even the most commonplace problems of any section of substantive law.

Then, too, the study of the theory of proximate cause will present cases, which, if properly analyzed, will teach the student how to differentiate between the rule of law for which the case stands and the method of reasoning by which the court arrives at its decision. It is a truism of legal study that judges have an uncanny instinct by means of which they reach a correct solution of a given case, while at the same time the reasoning by which they attempt to support their decisions is often fallacious and sometimes ludicrous. This is particularly marked in cases dealing with proximate cause, for here the courts are using terminology and follow lines of reasoning which constantly lead them to conclusions so psychologically impossible that one wonders how courts can be so blind to

the meaning of their own phrases.<sup>11</sup> The reason for this is that the courts are so busy that they cannot take the time to analyze the language they are using but are blindly following precedent. Certain phrases have been used before, so they use them again. The doctrine of foreseeableness, the language to the effect that a man must be held to expect the natural and probable consequences of his acts, that the proximate and not the remote cause must be held liable, are constantly being repeated in the cases, and yet few of the judges analyze the terms they are using. If they did they would often see how utterly unrelated to their actual decisions they are.

In this section of the course, then, the student is to be taught to distinguish between that which is a datum of substantive law, (namely the combination of specific facts, the question growing out of these facts and the way the question was answered), and that which is merely a method of solving the problem presented by the case, namely, mental processes of the judge). The former is fixed; and however much it may be distinguished from other cases, circumscribed or delimited, attacked and explained away, it stands as binding until reversed by another court of competent jurisdiction. But the latter is not binding. It is a tentative guide and not an unimpeachable dogma. The decision must be accepted, the reasoning of the court can be ignored if better reasons present themselves. Students rely too much and too blindly upon the language of the court, a text book, or the instructor himself. They must be taught to think about and criticize the language as well as the facts. They must be made to *explain* their reasons for a given holding as well as to memorize these reasons.

The function, then, of chapters two and three of the case-book is to develop in the student an ability to analyze and frame definitions, to recognize which definitions can be utilized for the solution of his specific

(11) Cf. Levitt; Proximate Cause and Legal Liability 90 Central Law Journal 188, 191 et seq.

problem, to see how legal facts are related to each other, to limit the scope of his inquiry within relevant spheres, to distinguish between the **fixed and tentative** factors in each case, and to realize that there must be some genuine, unequivocal relation between the act or omission which is charged to the defendant and the specific injury which the plaintiff has incurred.

Liability will be imposed upon individuals by reason of their acts or omissions, not only because of their relations to other individuals as individuals, but also because of their relations to the State and to society generally. When the interests of one individual is balanced against the interests of another individual, there is no inherent reason why one should outweigh the other. At most the Law can but take a fair rational rule and apply it to the dealings between the two individuals. But when the interests of the individual come into conflict with the interests of society, either in its organized form, the State, or its inchoate form, the general body politic, not merely rules but principles and standards need to be considered, weighed and enforced. The individual is a societal creator and creation. He cannot exist alone. His actions affect groups and masses of people. His activities have, or may have, consequences which need to be confined, controlled, restrained and curbed. As the circumstances of time and place change he may be free to act or not as these circumstances may determine. An inflexible rule of conduct cannot be applied to all of his activities. What is proper in one set of circumstances may be improper in another set of circumstances. His activities must be judged by standards of conduct, and liability must be imposed upon him, if at all, because of principle underlying social relationships, and not because of a fixed rule or concept of law, which is applicable only when an individual is balanced against an individual.

It is to such principles and standards that the class room discussions of the cases in

chapters four and five of the case-book ultimately lead. It is here that the definite relationship between the individual and the State and Society emerges in its legal aspects. It is the first time, as the ordinary curriculum runs, that the student is faced with this problem and made to apply himself to it. Here he learns that an individual must make compensation for the results of his activities, even though these are not the proximate consequences of his acts and even though the element of blame in his conduct is negligible. He begins to see that public, and social interests outweigh more often than not, individual interests. This is particularly true of the subjects studied in chapter five. For here the student considers the reasons why men are allowed to destroy property, reputation and even life itself, without being punished. He is taught that certain types of acts, under some circumstances, are permitted, and that he will be protected in the doing of these acts and will not be held accountable for their consequences. He discusses the meaning of duty, authority and privilege and delimits the sphere within which each applies. Above all this is an excellent place for eradicating the tendency on the part of the student to use the word "right" when he means almost anything but a legal right. Insistent curbing of the use of this term results, in a very short time, in having the student use the term very rarely, and then only with a careful definition attached thereto.

At this point it may be urged that in spite of my former statement that I am not in favor of giving first-year men a course in denatured jurisprudence, I am actually teaching a section of jurisprudence. For, nothing can be more obviously a part of jurisprudence than the nature of right, duty, authority, act, cause, and interests. This of course is true, but it is equally true that every part of substantive law is a part of jurisprudence. The objection overreaches itself. You cannot get away from jurisprudence while working with the subject matter of jurisprudence. There is this

difference, however, between the teaching of Jurisprudence and the teaching of Legal Liability. In the former the emphasis is upon the philosophy of law and the legal subject matter is used by way of illustration and argument; but in the latter the subject matter is of first importance and the social and philosophic backgrounds are utilized, as to my mind they should always be utilized, for finding and developing the reasons why the law is as it is. We are not teaching jurisprudence with substantive law as illustrative material, but we are teaching substantive law, with the philosophy of law as a reason when reasons are demanded. That is, we are not questioning the validity of the foundations of the entire legal ordering of society, but we are taking the substantive law as it is and trying to see how it is connected with this legal ordering. And, again let me say, both substantive law and the philosophy of law are simply means to an end, *i. e.*, getting the student to think his problems through.

Summing up then, we can say that the scope of the course in legal liability is the definition of certain legal terms, rules, principles and standards; the utilization of these definitions as working tools for the development of the study of substantive law; and methods of reasoning on legal subjects which will help develop thinking powers of the students. The object of the course is to teach methods of approach to legal problems; to stimulate mental functioning; and to bridge the gap existing between pre-legal and legal studies.

In conclusion one must frankly raise this question; Does the course in legal liability actually do all I have claimed for it? My answer cannot be an absolute one. My experience is very limited and my data very meagre. But such as they are, this tentative, undogmatic conclusion is justified. Those men who have studied legal liability intensively and hard approach their other courses with a greater degree of understanding of what their problems are, with

more power to analyze the facts presented to them, with greater ability to distinguish between essentials and unessentials, with a keener realization of the need for accurate thinking, and a greater willingness to work on the cases, instead of waiting on the professor, than those who have not had this intensive training. It may be urged that it is the function of every course and every instructor to give this intensive mental stimulation. The answer is that all courses and all instructors do not do this. The old saw holds true in teaching as well as politics; "Everybody's business is nobody's business." There should be one course definitely set aside to do this much-needed thing, and one instructor, who is especially fitted by temperament and training to do this work, definitely saddled with that responsibility. The course I think, is the course in Legal Liability; the instructor should be a devotee of sociological jurisprudence.

ALBERT LEVIT.

Washington, D. C.

#### EVIDENCE—CARBON COPIES.

MARTIN & LANIER PAINT CO. v. DANIELS.

108 S. E. 246.

Court of Appeals of Georgia, Division No. 1,  
July 26, 1921.

Duplicate or carbon copies of letters made by the same pencil at the same time are not "copies," but duplicate originals, and could be introduced in evidence without notice to produce.

Upon the call of the case for trial, counsel for the plaintiff company, in response to a notice from the defendant to produce certain letters alleged to have been mailed to the plaintiff, read affidavits from all the partners of the plaintiff company showing that no such letters had ever been received by them or the company. Subsequently, upon the trial, the defendant was permitted, over the plaintiff's objection, to prove that he had written such letters to the plaintiff company, and had properly addressed and stamped the envelopes and placed them in the post office; that his return ad-

dress was upon the envelopes, and that the letters had never been returned to him; that the letters which he (the defendant) held in his hands were duplicate or carbon copies of the letters mailed to the plaintiff company—that they were made by the same pencil at the same time. The plaintiff objected to this evidence, and also to the introduction of the letters themselves, on the grounds that the originals of the letters had not been sufficiently accounted for to authorize the introduction of secondary evidence, and that the evidence was irrelevant and immaterial, since the uncontradicted affidavits of all the members of the plaintiff company, which were read in response to the notice to produce the letters, showed that the letters had never been received by the company, and therefore the presumption that they had been received was completely rebutted. Another ground of objection to one of the letters was that it countermanded the order for the goods in question, which order was not subject to countermand. These grounds were properly overruled, for the following reasons:

First, the letters admitted in evidence were not copies, but were "duplicate originals," and could have been introduced in evidence without any notice "to produce." *Bowman & Tarpley v. Atlantic Ice & Coal Co.*, 19 Ga. App. 115 (2), 117, 91 S. E. 215, and citations.

Second, the affidavits of the members of the plaintiff company, read in response to the notice to produce, were not admissible evidence, and were not put in evidence during the trial of the case, and were properly disregarded by the court.

Third, the fact that one of the letters countermanded the order which was not subject to countermand did not render the letter inadmissible. The plaintiff was suing upon an open account, and while the order for the goods sold provided that it was not subject to countermand, yet if the defendant did in fact countermand it before the goods were shipped, while this would not relieve him from liability, the plaintiff could not maintain an action upon an open account for goods sold and delivered, but would have to sue for a breach of the contract.

The evidence authorized a finding that the goods shipped to the defendant were not the goods ordered by him, and the verdict in his favor was supported by the evidence, and the court did not err in refusing to grant a new trial.

Judgment affirmed.

NOTE—*Admissibility in Evidence of Carbon Copies as Duplicate Originals.*—In the case of *International Harvester v. Elstrom*, 101 Minn. 263,

112 N. W. 252, 12 L. R. A. (N. S.) 343, it is held that the different numbers or impressions of a writing produced by placing carbon paper between sheets of paper and writing upon the exposed surface are duplicate originals and either may be introduced in evidence without accounting for the non-production of the other.

Two papers of loss, simultaneously prepared, one being mailed to the insurance company and the other retained by the insured, were held to be of equal dignity in *Catron v. German Insurance Company*, 67 Mo. App. 544. Likewise, in *Wright v. Chicago, B. & Q. R. Company*, 118 Mo. App. 392, 94 S. W. 555, it was declared that a carbon copy of tickets showing the weights of cattle shipped, made at one writing of the weight upon the paper ticket, was practically an original, and that there could be no objection to receiving it as evidence.

In *Virginia-Carolina Chemical Company v. Knight*, 106 Va. 674, 56 S. E. 725, a copy of an accident report, which was one of three, made at the same time by the same impression of the copying pencil, was regarded as a triplicate original.

The same rule was applied to a carbon copy of a notice to quit, made on a typewriter at the same time as the original, signed by the same persons and in every respect an exact duplicate, one of which was retained and the other served on the tenant. The one retained, it was held, could be offered in evidence without notice to produce the one delivered. *Cole v. Ellwood Power Company*, 216 Pa. 283, 65 Atl. 678.

Where a claim for damages against a city was made in duplicate on a typewriter, the copy retained by claimant's attorney was admissible in evidence without notice to produce the other, although the duplicates were signed by the attorney with pen and ink. *Gainesville v. White*, Ga. App., 107 S. E. 571.

Notices of a demand of possession of land, prepared at the same time, and all alike except that three of them were addressed to different tenants and the fourth retained by the party who prepared them, were held to be all original duplicate papers. *Westbrook v. Fulton*, 79 Ala. 510. *Gardner v. Everhart*, 82 Ill. 316.

Letter press copies of documents do not fall within this rule, however, and are not admissible as originals. Note in 12 L. R. A. (N. S.) 344.

In *Gordon v. Christenson*, 188 N. Y. Supp. 135, it is held that defendant may prove his letter to plaintiff by a copy thereof only after notice to plaintiff to produce the original.

## ITEMS OF PROFESSIONAL INTEREST.

### BAR ASSOCIATION MEETINGS—WHEN AND WHERE TO BE HELD.

- California—Riverside, Oct. 20 and 21, 1921.
- Kansas—Topeka, Nov. 21 and 22, 1921.
- Nebraska—Omaha, Dec. 29 and 30, 1921.
- Oregon—Portland, Nov. 15 and 16, 1921.
- Rhode Island—Providence, Dec. 15, 1921.

## BOOKS RECEIVED.

Treaties and Agreements With and Concerning China, 1894-1919. A collection of state papers, private agreements, and other documents, in reference to the rights and obligations of the Chinese Government in relation to foreign powers, and in reference to the interrelation of those powers in respect to China, during the period from the Sino-Japanese War to the conclusion of the World War of 1914-1919. Compiled and edited by John V. A. McMurray, Counselor of Embassy of the United States, assigned to Tokyo; lately Secretary of the American Legation at Peking. Volume I, Manchu Period (1894-1911). Volume II, Republican Period (1912-1919). New York, 1921.

The Proceedings of The Hague Peace Conference. Translation of the Official Texts. Prepared in the Division of International Law of the Carnegie Endowment for International Peace, under the supervision of James Brown Scott. Volume I, Plenary Meetings of the Conference. 1920. Volume II, Meetings of the First Commission. 1921. New York.

The United States of America: A Study in International Organization. By James Brown Scott, Technical Delegate of the United States to the Second Hague Peace Conference, 1907; Technical Delegate of the United States to the Peace Conference at Paris, 1919. New York, 1920.

Government Control and Operation of Industry in Great Britain and the United States During the World War. By Charles Whiting Baker, C. E. New York, 1921.

World Peace, or Principles of International Law in Their Application to Efforts for the Preservation of the Peace of the World. By Fred H. Aldrich. Lectures Delivered Before the Detroit College of Law. 1921.

Economic and Social History of the World War (British Series) by James T. Shotwell, Ph. D., General Editor, with the collaboration of the British Editorial Board of the Carnegie Endowment for International Peace. 1921.

## HUMOR OF THE LAW.

A chaplain was noted for his ready wit.

While traveling on a steamboat a notorious sharper who wished to get into his good graces said: "Father, I should like very much to hear one of your sermons."

"Well," said the clergyman, "you could have heard me last Sunday if you had been where you should have been."

"Where was that, pray?"

"In the county jail."

Lawyer (examining witness). Do you drink intoxicating liquor?

Witness (indignantly). Sir, that's my business!

Lawyer (quietly). Have you any other business?—*Scalper.*

First Autoist—"I thought you said if I were sociable with the judge I could get off?"

Second Autoist—"Were you?"

First Autoist—"Yes. I said 'Good Morning, Judge, how are you today?' and he replied, 'Fine—twenty-five dollars.'"

Cop: "Come on! What's the matter with you?"

Truck Driver: "I'm well, but me engine's dead."

There was an amusing ending of a civil case tried in the county court. It was an appeal case and on one side was a testy lawyer and on the other a number of inexperienced ones. The arguments on both sides had been heard and the case closed for judgment.

Suddenly one of the inexperienced lawyers got up and addressed the court once more. The testy lawyer stood for it a moment, but losing patience, he also arose and addressed the court in this wise:

"Your honor, I would beg with all respect to point out to the court that my learned friend opposite is entirely out of order in addressing the court, and if I may be permitted to say so, the court has no right to be listening to him."

The court, who at the time was writing, put his head out in a belligerent way and said: "Mr. Smith, it is a great piece of impertinence on your part to assume that the court is listening to him."—*Los Angeles Times.*

## WEEKLY DIGEST.

## Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

Alabama	52, 56
Arkansas	11
California	26, 30, 47
Delaware	22, 25
D. C.	28
Georgia	5, 6, 35, 43
Illinois	54
Iowa	1, 31, 63, 65
Louisiana	1, 12, 38, 60
Maine	58, 67
Mississippi	18, 48
Missouri	16, 24, 33, 34
Montana	14, 51
New Hampshire	64
New Jersey	8, 23, 44
New York	29, 39, 40, 41, 59, 61
Pennsylvania	62
Rhode Island	20
South Carolina	15, 53, 66
South Dakota	17, 46
Texas	13, 27, 32, 36, 49, 55
United States C. C. A.	2, 45, 68
United States D. C.	3, 4, 10, 37
Utah	21
Virginia	50, 57
Washington	9, 42
Wisconsin	7, 19

1. **Adverse Possession**—Interest in Land.—Where plaintiff's father conveyed land to his wife, and after her death a mortgage thereon was foreclosed and the land sold to the assignee of the judgment creditor, who then deeded it to plaintiff's brother, the latter continuing in possession with color of title and asserting his claim of right for nearly 22 years, all of which was known to plaintiff and her father, plaintiff's right to an interest as an heir either of her mother or father was barred by the 10-year statute of limitations.—*Barth v. Severson*, Iowa, 188 N. W. 617.

2. **Bankruptcy**—Chattels.—Where the stock in trade of a bankrupt was collusively sold under a chattel mortgage, which was preferential and invalid under the Bankruptcy Law, to a representative of the mortgagee, who resold it to a bona fide purchaser for value, the latter held to have acquired a good title; but the seller and mortgagee held liable to the bankrupt's trustee for the amount received therefor.—*Gray v. Breslow*, U. S. C. C. A., 273 Fed. 526.

3. **Insurance Policies**—Insurance policies on the life of a bankrupt, payable to his wife, but reserving to him the absolute right to change the beneficiary, so that the bankrupt had full control over the policies, are assets of his estate, and the trustee is entitled to receive the surrender value thereof.—*In re Jens*, U. S. D. C., 273 Fed. 606.

4. **Jurisdiction**—Where there were more than 100 separate damage claims against a bankrupt corporation, all arising from the same transaction, on some of which actions had been brought in the state courts, and on all of which liability depended on the same facts, the bankrupt held entitled to an injunction restraining prosecution of suits on such claims until it could obtain its discharge, and its trustee held entitled to an order requiring adjudication of the claims in the bankruptcy court where they could be consolidated for trial as to liability.—*In re People's Warehouse Co.*, U. S. D. C., 273 Fed. 611.

5. **Payment of Check**—In a prosecution based on section 553 of the Penal Code of 1910, it is a good defense for the accused to show that payment of a bank check, given in payment for farm, orchard, or dairy products, was refused by the drawee bank, when presented for payment, solely because, after the giving of the check and prior to its presentation for payment,

tary bankruptcy, and his funds in the bank, which were sufficient to pay the check, were seized by a receiver appointed to take charge of the bankrupt's property.—*Oetgen v. State*, Ga., 107 S. E. 885.

6. **Banks and Banking**—Corporate Existence.—Even if the General Assembly had no authority in 1870 to enact a law incorporating two separate and distinct corporations in one act yet where such an association actually organized and existed under such colorable authority, and used the rights claimed to be conferred by such charter, and did business under it as a corporate body, the directors of such organization, who acted as such, will be estopped from denying the corporate existence of such organization as against the corporation itself, its receiver, and third persons who have dealt with it as a corporation.—*Council v. Brown*, Ga., 107 S. E. 867.

7. **Forgery**—Where the by-laws of a savings bank provided that it should not be liable for payments made to any person who should produce the deposit book, and that withdrawals might be made by the depositor personally or by written order, payment on written order to one producing the deposit book exonerates the bank from liability to a depositor, provided the bank in making such payment was in the exercise of ordinary care.—*Ninoff v. Hazel Green State Bank*, Wis., 183 N. W. 673.

8. **Joint Deposit**—Where husband and wife made a deposit in a bank, signing memorandum stating that they were to hold "as joint tenants, and not tenants in common" and there was an entry in bank book that they were to "hold as joint tenants and not as tenants in common, the survivor to take," a contract was created between the two depositors and the bank, which gave the survivor the right to take.—*Commonwealth Trust Co. v. Grobel*, N. J., 114 Atl. 353.

9. **Stockholder's Liability**—The amendment of the articles of incorporation of a bank so as to change its name and increase its capital stock does not change the identity of the corporation, so as to relieve a stockholder, who subscribed to shares of the original issue, and who opposed the amendments, from his liability on the stock held by him.—*German-American Mercantile Bank v. Foster*, Wash., 199 Pac. 314.

10. **Bills and Notes**—Holder in Due Course.—Negotiable Instrument Law Ill. § 65, 66, providing that indorsers warrant the genuineness and validity of the instrument to all subsequent holders in due course, do not apply to the drawee of a draft, to whom it is presented for payment, who does not become by payment a "holder in due course."—*American Hominy Co. v. Millikin Nat. Bank*, U. S. D. C., 273 Fed. 550.

11. **Bridges**—Tolls.—The right to exact tolls of the public for the privilege of crossing a public bridge must be conferred by statute or it does not exist.—*Ft. Smith Light & Traction Co. v. Williams*, Ark., 231 S. W. 891.

12. **Brokers**—Authority.—Authority of broker to sell land is not revoked by a letter mailed to, but never received by, him.—*McWilliams v. Reith*, La., 88 So. 913.

13. **Dividing Commissions**—An agreement by a broker to divide his commissions with the purchaser of real estate does not affect his right to recover, though the principal does not know it, nor will his agreement to divide with another broker, who is not connected with the other side.—*Christian v. Dunavent*, Tex., 232 S. W. 875.

14. **Carriers of Goods**—Voluntary Reduction of Rate.—A voluntary reduction of a rate by a carrier would not make the prior rate unlawful, unreasonable, or discriminatory and the basis for an action for damages.—*Doney v. Northern Pac. Ry. Co.*, Mont., 199 Pac. 433.

15. **Carriers of Passengers**—Alighting.—A public street in a city, at a point where a street car stops for passengers to alight is not to be regarded as a passenger station, in determining the duty of a street railway company towards its passengers, and a passenger, who stepped on a banana peel and fell, cannot recover.—*Thompson v. Greenville Traction Co.*, S. C., 107 S. E. 911.

16. **Ordinary Care**—Where a defendant equipped steps in a station giving access to trains with safety tread, which was supposed

to afford a firm footing even though wet, a passenger, who slipped on a step which had become wet presumably from the wet or muddy shoes and dripping umbrellas of the preceding passengers, cannot recover from defendant; it having exercised ordinary care.—*Williams v. Kansas City Terminal Ry. Co.*, Mo., 231 S. W. 954.

17. **Constitutional Act—Due Process.**—The manufacture of cement by the state held the carrying out of a public purpose in view of the facts shown and facts judicially noticed as to the use of cement, its shortage, etc., and hence Laws 1919, c. 324, authorizing the creation of a state cement commission and the issuance of bonds for the establishment of plants for the manufacture of cement, does not deprive taxpayers of their property without due process of law.—*Eakin v. South Dakota State Cement Commission*, S. D., 193 N. W. 651.

18.—**Due Process.**—The provisions of chapter 145, Code of 1906, and amendments thereto, are not suspended by Act Cong. Aug. 10, 1917, commonly called the Lever Act, even if this act is valid, and the enforcement of the provisions of the said Anti-Trust Act against insurance companies does not deprive them of the equal protection of the law, nor deprive them of property without due process of law.—*Nugent & Pullen v. Robertson*, Miss., 88 So. 895.

19.—**Equal Protection.**—Laws 1920, c. 16, enacted to meet the housing emergency resulting from the war, but which was to apply only to counties having a population of 250,000 or more, denies equal protection of the laws to landlords in such counties, since the housing emergency existed also in other counties, and the mere fact that more people were affected thereby in a large county does not furnish reasonable ground for separate legislation for such counties.—*State v. Railroad Commission*, Wis., 183 N. W. 687.

20.—**Federal and State Laws.**—The first ten amendments to the United States Constitution are restrictions solely on the powers of the federal government, and a state law cannot successfully be attacked as violative of Const. U. S. Amend. 5.—*Joslin Mfg. Co. v. Clarke*, R. I., 114 Atl. 185.

21.—**State Insurance.**—Inasmuch as the state has the power to require all employers to insure in the state insurance fund and not leave it optional, as under the Workmen's Compensation Law, an employer exercising such option cannot complain of the conditions upon which the option is granted as being unconstitutional because discriminatory.—*Salt Lake City v. Industrial Commission*, Utah, 199 Pac. 152.

22. **Corporations—Compensation of Directors.**—Where directors of a new corporation secured a lease of land for its factory, supervised the construction, etc., they were not entitled to vote themselves shares of stock as compensation for such services were along the lines of the duties of the directorate, which are those of management and supervision; the details of the business being delegated to inferior agents.—*Cahall v. Lofland*, Del., 114 Atl. 224.

23.—**Profit on Resale of Bonds.**—Where an officer of a corporation purchased from the company 50 \$1,000 bonds at par, and later sold back to the company 43 of the bonds so purchased at an increased price of \$50 a bond, and still later sold back the remaining 7 bonds at the same price, he cannot be permitted to enjoy the fruits of such a contract with the company he represented against its will exercised within reasonable time, and the contractual profits secured by him through the purchase and resale of the bonds must be returned to the company unless the contract of resale has been intelligently ratified by a stockholders' meeting, or the company's claim has not been asserted within a reasonable time.—*Busch v. Riddle*, N. J., 114 Atl. 348.

24. **Covenants—Building Restrictions.**—Six double buildings sought to be constructed on a lot having a frontage of 125 feet and a depth of 155 feet held to violate restriction in deed reciting that not more than one dwelling house might be constructed on a 50-foot front of the lot.—*Morrison v. Hess*, Mo., 231 S. W. 997.

25. **Damages—Measure of.**—Plaintiff, a girl of 10, injured by defendant street railroad's car,

if entitled to recover, was entitled to recover a sum reasonably compensating her for her injuries, including pain and suffering in the past, and such as might come to her in the future, and for any permanent injuries received; while her father, suing for loss of services, was entitled to reasonable compensation for expenses for professional and hospital services in the care and attention given his daughter.—*Sund v. Wilmington & P. Traction Co.*, Del., 114 Atl. 281.

26. **Deeds—Survivorship.**—Where a husband and his wife some time before the wife's death, each executed a deed to the other and placed them in their safe deposit box on the understanding that on the death of one the survivor would take all the property by the deed of the one dying, and the deed of the survivor would not take effect, the transaction was wholly ineffective.—*Miller v. Brode*, Cal., 199 Pac. 531.

27. **Frauds, Statute of—Parol Contract.**—Where a contract for the sale of land was not in writing, a note executed in aid of such contract was wanting in consideration, and is not enforceable.—*Davis v. Dilbeck*, Tex., 232 S. W. 927.

28. **Insurance—"Arrears."**—A member of a fraternal benefit association, who had the option of paying his dues weekly, monthly, or quarterly, is not in arrears on the payment of dues until the end of the quarter, within a provision of the constitution prohibiting payment of benefits where the member is three months or over in arrears for weekly dues, since "arrears" is defined as that which is behind in payment, or which remains unpaid, though due, and therefore the association is liable on the certificate, where the member died within one month after the expiration of the first quarter for which no payment was made, at which time he was then only 30 days in arrears.—*Independent Council No. 2, Etc. v. Lucas*, D. C., 273 Fed. 320.

29.—**Burden of Proof.**—In an action by assignee of beneficiary under a life policy, where through concessions made by defendant's attorney plaintiff made out a prima facie case, court erred in dismissing by reason of a condition in the policy requiring the production thereof or a legal excuse for its non-production, where there was no legal proof as to what the provisions of the policy were in the respect named, for it would seem that, if defendant relied on a dismissal for non-compliance with a condition precedent to a recovery contained in the policy, it should have proven the condition and plaintiff's failure to perform it.—*Casey v. Metropolitan Life Ins. Co.*, N. Y., 189 N. Y. S. 70.

30.—**By-Laws.**—A fraternal benefit society, which has issued certificates on applications by which insured agreed to be bound by the society's by-laws then in force and to be thereafter enacted, can make by-laws subsequently enacted, which are not in themselves unreasonable or against express law or public policy, applicable to such existing certificates.—*Bennett v. Modern Woodmen of America*, Cal., 199 Pac. 343.

31.—**Payment of Benefits.**—Where the statute under which a fraternal benefit association was organized prohibited the payment of the benefits except to designated classes, including the wife of insured, the divorce of the wife designated as beneficiary precludes the payment of the benefits to her, though it would not have that effect if the statute merely prohibited the issuance of the certificate with benefits payable to others than the designated classes.—*Thomas v. Locomotive Engineers' Mutual Life & Accident Ins. Ass'n*, Iowa, 183 N. W. 628.

32.—**Removal of Goods.**—Where, when defendant company issued its fourth insurance policy on plaintiff's cotton, its agent did not know that the cotton had been removed to the compress, and wrote the policy at a lesser rate than he would if he had so known, and the plaintiff, without reading it, put it away among his papers, and the cotton was destroyed, it was error to render a judgment against the defendant for the insurance, for, on renewal, the insurer may assume that the subject-matter and its location are as described in the former contract, and insured could not excuse his failure to notify the insurer of the change of location on the ground that he did not know a change

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of locations affected the risk, as that is matter too obvious to be overlooked by a person of ordinary prudence.—*National Liberty Ins. Co. v. Kelly, Tex.*, 232 S. W. 895.

33.—**Suicide Clause.**—A clause against liability of insurer in the case of suicide within one year from the issuance of the policy, which is not prohibited by statute in the state in which the parties resided and where the policy was made and delivered and the insured died, is binding, since the policy is governed by the law of that state.—*Parker v. Aetna Life Ins. Co., Mo.*, 232 S. W. 708.

34.—**Waiver of Limitation.**—Where an insurance certificate required action to be brought within a year after death, and insurer, which had denied liability on the theory that an assessment had not been paid, considerably after the expiration of a year, at the demand of the beneficiary's attorney, furnished blanks for proofs of death, stating, in a letter written by its general counsel, that the deceased was not a member of the insurer at the time of his death because of failure to pay assessment, such letter was a waiver of the defense of limitations.—*Hay v. Bankers' Life Co., Mo.*, 231 S. W. 1035.

35.—**Intoxicating Liquors.**—Inference.—In the absence of evidence to the contrary, it may be inferred that a liquor called for and delivered and paid for as whisky is whisky, and therefore intoxicating liquor.—*Frazier v. State, Ga.*, 107 S. E. 896.

36.—**"Possession."**—In prosecution for unlawfully possessing intoxicating liquor, an instruction that the word "possess" means the exercise of actual control, care, and management of the property is correct, the ownership of the property not being an essential element of its possession.—*Thomas v. State, Tex.*, 232 S. W. 826.

37.—**State Laws.**—A city has power to regulate the possession of intoxicating liquors in a manner not in conflict with the National Prohibition Act or the laws of the state, and may authorize the search of a private dwelling for liquors unlawfully possessed, where not prohibited by the state laws, though National Prohibition Act, § 25, provides that no search warrant shall issue thereunder to search any private dwelling.—*United States v. Viess, U. S. D. C.*, 273 Fed. 279.

38.—**Landlord and Tenant.**—Injury to Lessee.—A wife was not entitled to recover under Code, art. 2717, for personal injuries received, owing to the rottenness of a window frame of a house leased by defendant to her husband, in which they lived; the appliance for holding up the sash giving way, and the sash falling upon her hand and crushing it, in view of article 2716, the husband, and not the lessor, being at fault.—*Harris v. Tennis, La.*, 88 So. 912.

39.—**Provisions of Lease.**—Where lease provided, "if the landlord is requested to furnish electric current to the tenant for lighting purposes and the landlord shall furnish such current, that the same shall be paid for by the tenant," the tenant could not recover for failure to supply electric current, in the absence of a showing that tenant could not obtain electricity with or without a separate meter for herself.—*Curry v. Coyle, N. Y.*, 189 N. Y. S. 65.

40.—**"Structural Addition."**—An oil separator was a "structural addition" to a leased garage, within the provision of the lease that the tenant should make such repairs and alterations as should be required by any of the departments or bureaus of the city of New York, except that it should not be required to make structural additions.—*New York Motor Truck Sales Corp. v. Corse, N. Y.*, 189 N. Y. S. 94.

41.—**Unreasonable Rent.**—Fact that tenant had paid the rent for the four preceding months pursuant to the lease did not prevent his taking advantage of the plea that rent demanded for the month in question was unreasonable, pursuant to the recent statutes known as the Housing Laws.—*Schechter v. Traconis, N. Y.*, 189 N. Y. S. 144.

42.—**Master and Servant.**—Authority of Employee.—The test to determine whether a fellow employee of an injured servant was a vice principal is the power to exercise superintendence the drawer of the check was placed in involun-

and control, and it is immaterial whether the fellow employee had authority to employ and discharge.—*Barney v. Anderson, Wash.*, 199 Pac. 452.

43.—**Electric Shock.**—Where it is shown that the death of an employee was caused by an electric shock, this is sufficient under the doctrine of *res ipsa loquitur* to raise the inference that the wire containing the current was not safe, and to raise a prima facie presumption that the employer was negligent.—*Neary v. Georgia Public Service Co., Ga.*, 107 S. E. 893.

44.—**Ensuing Disease.**—Where a workman receives a personal injury from an accident arising out of and in the course of his employment, and a disease ensues which, but for the accident, would not have ensued and which disease causes his death, this justifies a finding that death was in fact the result of the injury and was by accident within the meaning of section 2 of the Workmen's Compensation Act, even though it is not the natural result of the injury.—*Geizel v. Regina Co., N. J.*, 114 Atl. 328.

45.—**Fellow Servant.**—The stevedore, who was not a member of the crew of a lighter, but was employed to unload her and paid by the hour, is not a fellow servant of the captain, and can recover for injuries caused by the captain's negligence.—*The Howell, U. S. C. C. A.*, 273 Fed. 513.

46.—**Recovery Under State Law.**—Recovery was properly allowed in a state court under a complaint setting forth a cause of action under the federal Employers' Liability Act, and also a cause of action under the state laws, where defendant railroad by its answer denied that plaintiff was in its employment and alleged and proved that plaintiff was an employee of an independent contractor, as against the claim that defendant, being a non-resident corporation, was deprived of its right to remove the cause into the federal court; there being no claim of a fraudulent intent on the part of plaintiff to deprive defendant of the right of removal.—*Polluck v. Minneapolis & St. L. R. Co., S. D.*, 183 N. W. 859.

47.—**Scope of Employment.**—In an action against a city for injuries to plaintiff from an assault by the city's employee, sent to the building of which plaintiff had charge to wire it for electricity and set meters therein, evidence that the assaula was committed by the city's employee while endeavoring to open a door against plaintiff's resistance, for the purpose of going on with his work, justified a finding that the assaula was committed in the course of the city employee's employment.—*Ruppe v. City of Los Angeles, Cal.*, 199 Pac. 496.

48.—**Monopolies.**—Anti-Trust Law.—One insurance company, in the absence of an agreement, could not violate this law by independently adopting as its rate of insurance the advisory rate of this bureau.—*Miller v. Fidelity Union Fire Ins. Co., Miss.*, 88 So. 711.

49.—**"Commodities."**—Within Rev. St. 1911, art. 7798, making it a conspiracy in restraint of trade to make an agreement to refuse to buy or sell any article of merchandise, produce or commodity, cuts to be used for advertising purposes in connection with advertising service, and which were not intended to be bought for resale, since their value would be destroyed by general use in the community, are not commodities, so that a contract, forbidding the sale of such cuts by the buyer, is not a violation of the Anti-Trust Act.—*Schow Bros. v. Adva-Talks Co., Tex.*, 232 S. W. 533.

50.—**Municipal Corporations.**—Damage by Flood.—In an action against a city to recover damages resulting to building and land from an overflow of a creek caused by negligence of city in maintaining improper culverts, the damage to the building occurring in one year and the damage to the land the following year, held that there was no merit to a contention that plaintiff ought not to be allowed to recover anything for damage to land itself because he did not, after the first flood had thrown down the walls of the building, take steps to prevent further damage by rebuilding a wall along the water's edge; such contention being a misconception of the general rule that a plaintiff must do what he can reasonably, to minimize the dam-

age which he claims for a breach of contract or for a tort, since plaintiff was not bound to anticipate and provide against future wrong.—*City of Richmond v. Cheatwood*, Va., 107 S. E. 831.

51.—**"Incidental Work."**—Under Laws 1913, c. 89, § 3, as amended by Laws 1915, c. 142, § 2, providing that, before creating any special improvement district, the city council shall pass a resolution of intention, stating the general character of the improvements to be made, a resolution of intention to create such a district for the purpose of paving, with the necessary excavations cutting, filling, etc., and "incidental work," was an insufficient description of the general character of improvements, which included a reduction in the street widths, new parking and curbing, storm sewers, etc.; large portions of territory in the district being already included in parking, curbing, and sewer districts.—*Evans v. City of Helena*, Mont., 199 Pac. 445.

52.—**Uncertainty of Ordinance.**—An ordinance fixing a license fee for practicing law based on gross annual business was not void for uncertainty, though not expressly referable to the previous year; its administrative provisions showing that reference could have been only to a gross annual income already determined and ascertainable.—*Anderson v. City of Birmingham*, Ala., 88 So. 900.

53.—**Negligence—Reasonable Care.**—Where defendant's own requested charge conceded that plaintiff was a licensee it was proper to modify that portion of the charge which stated that defendant's only duty was not to willfully or wantonly injure him, and impose on defendant the duty of reasonable care.—*McAlister v. Thomas & Howard Co.*, S. C., 108 S. E. 94.

54.—**Physicians and Surgeons—Qualifications.**—The regulation of the department of registration and education that an applicant under the Medical Practice Act for license to practice chiropractic must produce letters of recommendation from two reputable medical men or osteopathic physicians is unreasonable and discriminatory.—*People v. Love*, Ill., 131 N. E. 809.

55.—**Railroads—Scope of Station Agent's Employment.**—Where plaintiff went to defendant's railroad station for the purpose of sending a telegraphic message, the station agent being the operator, and an altercation and assault resulted when the demand of the agent that plaintiff dismiss an action which as attorney he had brought against the railroad company was refused, defendant was not responsible, as such demand was not within the scope of the agent's employment.—*Payne v. Tisdale*, Tex., 232 S. W. 881.

56.—**Reformation of Instruments—Mutual Mistake.**—Though for reformation of a deed or mortgage for mutual mistake in description, un-mixed with fraud, complainant must have been free from gross or culpable negligence, he need not show he was entirely free from fault.—*Burch v. Driver*, Ala., 88 So. 902.

57.—**Sales—Delivery.**—On motion for judgment by the buyer of rawhide shoe laces for the seller's refusal to deliver, instruction that, if the jury believed from the evidence that defendant seller agreed to fill plaintiff buyer's orders at the rate of 50,000 laces a week, beginning at a specified time, and failed to make deliveries as agreed, plaintiff buyer was justified in cancelling the orders, the jury should find for him, and assess his damages in conformity with the directions of the court, held not erroneous.—*Richmond Leather Mfg. Co. v. Fawcett*, Va., 107 S. E. 801.

58.—**Destruction of Goods.**—Where agreement was not to sell or convey a particular car of potatoes, but a car of any potatoes answering a certain description, containing no condition, expressed or implied, destruction of a car of potatoes in shipment did not excuse non-delivery, and seller was liable for damages.—*Cohen v. Morneault*, Me., 114 Atl. 307.

59.—**Misrepresentation.**—In case of misrepresentation concerning the identity of one with whom the seller is asked to deal, but who in fact is not present, because non-existent no title passes; the only intent of the seller being

to pass title to the absent entity, in the instant case a corporation which in fact did not exist.—*Cohen v. Savoy Restaurant*, N. Y., 189 N. Y. S. 71.

60.—**Partial Shipment.**—Where some of the unrelated goods ordered by a buyer could not be found on the market, and the vessel had not sufficient space for others, the buyer was not excused by the failure to ship such goods from paying for those shipped; the seller not having been instructed to ship all or none of the goods.—*H. T. Cottam & Co. v. Moises*, La., 88 So. 916.

61.—**Street Railroads—Negligence.**—Street railroad held liable for injuries to fingers of a passenger, caught in the crevice along hinges of a door inclosing electric switches, when the guard shut the door after having turned on the switches, though his fingers were not in crevice when door was opened immediately prior thereto; the railroad being required either to so construct the door that passengers could not catch their fingers in such crevice, or to see to it that the guard did not shut door when passengers might be endangered thereby.—*Grafstein v. Interborough R. Co.*, N. Y., 189 N. Y. S. 68.

62.—**Taxation—Foreign Corporations.**—Under Act June 2, 1915, as to taxation of foreign corporations, a foreign corporation which has within the state a number of cash registers which it has delivered to residents of the state under contracts which are leases with option to buy is liable to be taxed upon the value of such cash registers, though the real object of the transaction was a sale of the machines, as the situs of the property is in Pennsylvania, and represents an investment therein of the capital of the company doing business in the state.—*Commonwealth v. National Cash Register Co.*, Pa., 114 Atl. 366.

63.—**Time—Extension.**—Order extending defendant's time until September 20th to file exceptions to verdict, motion in arrest of judgment, and for new trial gave defendant a period including September 20th for such filing; "until" being inclusive in meaning unless a contrary intent is shown.—*Henderson v. Edwards*, Iowa, 183 N. W. 533.

64.—**Wills—Construction.**—Under a husband's will, giving all his possessions to his wife to be used according to her judgment and will, if she died without having made a will, possession to go to another on condition she provide for her mother, the wife was given the right to use or dispose of the property in any way she saw fit, but, if she died without disposing of it, it was to go to the other, charged with support of the mother.—*Fowler v. Ladd*, N. H., 114 Atl. 271.

65.—**Residuary Devise.**—The devise of all the residue of a testator's estate to his wife, after the payment of debts and the setting aside of specific bequests to her was not specific because all the real estate of which testator died seized was owned by him at the time of the execution of the will, the rule at common law that the will spoke as of the date of its execution not being in force in Iowa, where the will speaks as of the date of the testator's death.—*In re McAlister's Estate*, Iowa, 183 N. W. 596.

66.—**Witnesses—Parol Evidence.**—Where a contract is partly in writing and partly in parol, death stops the parol evidence, and the writing stands.—*Nickles v. Miller*, S. C., 108 S. E. 90.

67.—**Personal Knowledge.**—In actions between a living party and the representative of a deceased person, except in the case of bulky articles and services of such nature as to require assistance in delivery or performance, the person making the entries in regular books, whether he be the living party or a clerk, servant, or agent, if he has knowledge of the fact may make oath to the delivery or the performance of the services.—*Mansfield v. Gushee*, Me., 114 Atl. 296.

68.—**Privileged Information.**—An accidental injury to the eye of an employee, for treatment for which the employee consulted a physician, is a "disease," within Civ. Code Ariz. 1913, par. 1677, subd. 6, making privileged information obtained by a physician of a patient suffering from any disease.—*Phelps Dodge Corporation v. Guerrero*, U. S. C. C. A., 273 Fed. 415.